

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TIFFANY MARIE COLLINS and
COURTNEY LYNN COLLINS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

DANELL LYNN ASHBROOK,

Respondent-Appellant,

and

DANIEL D. COLLINS, JR.,

Respondent.

UNPUBLISHED

August 21, 2003

No. 245287

Branch Circuit Court

Family Division

LC No. 01-001939-NA

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Respondent Danell Ashbrook appeals as of right from the trial court's order terminating her parental rights to the minor children under MCL 712A.19b(3)(b)(i) and (j). We reverse and remand.

I. Basic Facts And Procedural History

A. Overview

Ashbrook appeals as of right from the October 23, 2002, order terminating her parental rights to the minor children, Courtney and Tiffany, pursuant to MCL 712A.19b(3)(b)(i) (the child or its sibling has suffered physical injury or physical or sexual abuse by the parent, and the court finds a reasonable likelihood that the child will suffer further injury if placed in the parent's home), and (j) (reasonable likelihood, based on the conduct or capacity of the parent, that the

child will be harmed if returned to the parent's home).¹ The court also terminated the parental rights of the children's father, Daniel D. Collins, Jr., as to both children, but Collins is not a party to this appeal.

B. The Initial Petition

This matter commenced when Collins took six-month-old Tiffany to the emergency room for treatment on the evening of May 7, 2001, while Ashbrook was at work. The initial petition alleged that Tiffany had a spiral fracture to her left arm, which she received while in the care of Collins, who was the only adult present at the time. According to emergency physician James Dempsey, "the injury was consistent with a twisting motion between the elbow and shoulder diagnosed as physical abuse. No reasonable explanation was provided by the parents or caregivers." Dempsey and orthopedic surgeon John Hartman, Jr., testified during the jurisdictional phase that Tiffany had a spiral fracture of the "lower third of the humerus," or upper arm. A spiral fracture is generally caused by "a twisting and a pulling simultaneously." The doctors noted that a fracture of any kind is rare in a child as young as Tiffany.

Collins apparently gave the physicians different explanations of the injury, suggesting that two-year-old Courtney had tried to pick Tiffany up, that Courtney jumped on the baby from the couch, or that he did not know what happened because the two children were in another room when the injury occurred. Collins acknowledged that her arm might have broken when he picked her up. Both physicians testified that a two-year-old was unlikely to have caused the injury, and that a two-year-old does not have the "strength or the leverage or the size to produce that type of fracture." The physicians said that Tiffany had no other bruises or injuries and was clean and well-kempt. Ashbrook was not called from the hospital and did not learn about the injury until she arrived home from work at about midnight.

C. The Second Petition

A second petition, filed on May 9, 2001, alleged that the family was living in an unheated trailer in the middle of a junkyard, that Tiffany's prescription for pediatric Advil had not been filled, and that both children had "filthy bodies and clothing." FIA child services worker Rhonda Bradley testified at the jurisdictional trial that the area around the trailer was full of old cars, car parts, and baby equipment.

Bradley returned the following afternoon and reported that Collins and Ashbrook had not yet filled Tiffany's prescription and that the children were not dressed in clean clothing. Bradley served Collins and Ashbrook with notice of a 2:30 p.m. hearing that same day. Bradley said that the "primary reason for the removal [of the children from respondents' home] was the injury to the arm," but that the physical condition of the trailer and the yard caused concern about the safety of the children. Bradley was also concerned that the trailer did not have a heat source, although Collins' father testified that Collins and Ashbrook stayed in Collins' parents' house when the weather was too cold.

¹ Termination was also requested under § 196b(3)(c)(ii) (other conditions that would cause the child to come within the court's jurisdiction have not been rectified) but the court found that termination was not warranted under that subsection.

Following the jury determination that the trial court had jurisdiction over the children, the trial court stated:

I will maintain present orders. I believe that the – I will ask the agency, and tell the agency, to provide as many supervised visits as are possible. After the testimony that's been presented here I have some question concerning unsupervised visits, particularly by father.

I'll order that there be a psychological evaluation of both mother and father for me by the dispositional hearing, as this Court has listened to the testimony, and it has certainly raised question concerning any limitation that might be existent.

I don't want there to be any misunderstanding. This baby has a broken arm while in father's care. There was no one else in the room that could have caused it. Father did. I will deal with this matter on that basis. Thank you.

D. The Termination Proceedings

At the termination proceedings, which began in April 2002 and concluded in October 2002, Dr. Lupini, the evaluating psychologist, testified that Collins was indifferent to Tiffany's injury and to the fact that the two children were in foster care. Collins said he did not know how Tiffany was injured but that he did not do it. Collins initially blamed the injury on the other child, Courtney. Lupini noted that Ashbrook was not present at the time of the injury, but nonetheless gave a detailed explanation of how Courtney might have injured Tiffany. Lupini said that although Ashbrook was not herself a threat to the children and had the mental capacity necessary to parent a child, Lupini did not believe the children were safe with their parents.

Roberta Adams, who counseled both Ashbrook and Collins, testified that despite both parents' cooperativeness and positive attitudes, they did not benefit from counseling. Both parents lacked insight and denied that there was any problem. Ashbrook told the counselor that she would admit that Collins injured the child, but that she believed it was an accident.

Collins testified that Tiffany was accidentally injured when he "picked her up wrong," and explained that "I just stuck my hands underneath her and picked her up, and she rolled over in my arms while I picked her up." Collins was aware that Dempsey testified that the injury was intentional, but Collins continued to maintain that it was an accident, stating that "all I know is I picked her up. She rolled over on my arms and I just continued picking her up." Collins acknowledged that he testified at the previous trial that Tiffany might have been injured by Courtney, but said that, in his attempt to explain what happened, he "was just jumping at conclusions, which [he] shouldn't have done." At the jury trial, Collins had testified that he laid Tiffany on the floor to sleep and that he was watching television when Tiffany started to cry and that he assumed that Courtney, who was climbing onto the couch, had injured the baby.

During his relationship with Ashbrook, Collins was married to another woman and had two other children with his wife. Collins said that Ashbrook was now his "ex-girlfriend," and that he was working on a divorce from his wife and living with his parents. He said that he and Ashbrook were living apart on their attorney's advice, although he believed that they should "be

still together as a family.” Collins said that he loved Ashbrook and the children and that he would move back in with Ashbrook if the judge approved. Collins said that he had completed a parenting class and that he had since learned the proper way to pick up a child.

Ashbrook acknowledged that her children were taken from her “because my daughter’s arm got broken by her father.” Ashbrook explained that two-year-old Courtney had attempted to push, jump on, and lift Tiffany in the past, which initially led her to theorize that Courtney might have fractured Tiffany’s arm. After doing some research on spiral fractures on the Internet, however, Ashbrook learned that the injury could only have been inflicted by an adult, and she now believed that Collins injured the child, although she thought the injury was accidental. Ashbrook said that she and Collins had a good relationship, and that she had never seen Collins get angry with her or the children.

Ashbrook stated that she had completed parenting classes, that she and Collins visited the children every week, and that Tiffany was not afraid of Collins. Ashbrook did not believe that Collins hit Tiffany, but thought he “probably wasn’t fully aware of what could happen.” She believed that he was now aware. Ashbrook testified that she would protect her children, whether or not she believed that their father would intentionally hurt them. She stated that she had done everything asked of her and was not sure why the children were not with her now. She further stated that she wanted her kids back, “with or without” Collins.

Child welfare worker Shelli Snow testified that termination was in the best interests of the children. Snow was concerned that Collins never admitted to her that he injured Tiffany, and felt that it would not be appropriate for Ashbrook to regain custody until Ashbrook came to believe that Collins caused Tiffany’s injury. Snow did not believe that Ashbrook would intentionally injure the children, but believed that the children would continue to be at risk because Ashbrook “doesn’t fully believe that [Collins] is going to hurt the children.” Snow acknowledged that Collins was not “pathologically” inclined to injure a child. Snow noted that Ashbrook and Collins were still seeing each other and she did not believe that Ashbrook would remain separate from Collins.

Snow testified that, although Ashbrook and Collins had been cooperative and participated in all the required services, Snow did not believe that “real progress” had been made. Snow was concerned about their ability to care for the children and felt that both parents lacked insight into the children’s needs, noting that Ashbrook never filled Tiffany’s prescription for a brace the child needed for a hip problem; failed to follow through on eye exams, although both children needed glasses; and had not known what to do when the baby put something into her mouth and began to choke. Snow said that Ashbrook had acquired appropriate housing although she was concerned about whether Ashbrook would be able to pay her bills. Snow also observed that Ashbrook never requested more or longer visits, and that when visits were over, the children clung to their aunt and uncle and did not cry for their parents. Snow felt that the children were developmentally delayed because of their parents’ limitations, but were now doing well in their aunt’s and uncle’s home.

During the proceedings, the trial court reiterated its view that the “problem” in this case is that Collins “broke a baby’s arm.” At the hearing on May 23, 2002, the trial court found that, after months of counseling, no one had addressed that problem, and ordered that Ashbrook and Collins be seen by a more “aggressive” counselor to discuss the question of abuse. In keeping

with the trial court's order, Ashbrook and Collins were referred to Dr. Haugen, who, after an assessment, determined that "they would not actually benefit from counseling." Although Ashbrook was "ambivalent" about whether Collins abused her child, Ashbrook admitted to Haugen that Collins had anger problems, had hit her several times, and had threatened to kill her if she left him. Haugen felt that Ashbrook's ability to cope was limited. Haugen testified that Ashbrook's "prognosis is very poor" and that there was no reasonable likelihood that she could safely parent her children anytime in the near future because she would need "some significant time to develop just the ability to manage herself independently."

The record reflects that Collins ultimately pleaded no contest to a child abuse charge and was sentenced to a term of ninety days in jail. Ashbrook was out of contact with FIA workers for about three months. However, Ashbrook continued to meet with a family specialist partner to work on parenting skills and developmental issues concerning the children, but after a year and a half, "did not appear to be learning or retaining the information that was given to her." Ashbrook continued to visit the children, and began a relationship with another man.

By the time of the final hearing, Ashbrook had not lived with Collins for two months. Ashbrook admitted that she did not know whether Collins could be trusted with the children, but said that, in any case, there was a restraining order to keep him away from them. She was working on her GED and was planning to become a certified nurse's aide. She had suitable, affordable housing; was working; had a car; regularly visited the children; and continued to take whatever classes were available through the FIA to become a better parent.

E. The Trial Court's Findings

The trial court found that this case began because Collins hurt Tiffany, although the trial court believed it was possible that Collins had not intended to hurt the child. The trial court found that the FIA had failed to comply with two specific court orders that Ashbrook receive counseling and, instead, merely assessed her and presented evidence of her limitations. Nonetheless, the trial court found that the children had been in foster care for eighteen months and were entitled to "finality." The trial court then terminated the parental rights of both Ashbrook and Collins.

II. Clear And Convincing Evidence

A. Standard Of Review

Ashbrook argues that the trial court clearly erred in finding that the statutory grounds for termination were established by clear and convincing evidence. The burden is on the petitioner (the FIA) to show that a statutory ground for termination in MCL 712A.19b(3) has been met by clear and convincing evidence.² We review the trial court's decision for clear error.³

² *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

³ *Id.* at 356-357.

B. Injury Or Abuse

We conclude that the trial court clearly erred in finding that termination of Ashbrook's parental rights was warranted under § 19b(3)(b)(i) (the child or its sibling has suffered physical injury or physical or sexual abuse by the parent, and the court finds a reasonable likelihood that the child will suffer further injury if placed in the parent's home). This section is clearly directed at the parent whose act caused physical injury or abuse to the child. Here, there were no allegations or evidence that Ashbrook ever harmed her children, and it was undisputed that she was not at home when her daughter was injured. Although this statutory ground was applicable to Collins,⁴ it was not applicable to Ashbrook.

C. Likelihood Of Harm

We also conclude that the trial court erred in relying on § 19b(3)(j) as a basis for terminating respondent's parental rights. Under § 19b(3)(j), termination is warranted if "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The trial court's decision does not reflect any finding or conclusion that it viewed Ashbrook as a threat to the children. Rather, the trial court stated that "the issue here is still that this man broke this child's arm and that hasn't been addressed." As we have noted, there was no evidence that Ashbrook ever harmed her children, and the trial court itself acknowledged that respondent "never damaged the child."

The trial court stated that Ashbrook had not gained insight into the issues that gave rise to the petition, and the record reflects continuing concern with the fact that Ashbrook would not admit that Collins intentionally harmed Tiffany. However, the record also reflects that Ashbrook was not present when the injury occurred, and thus could not have known whether the injury was intentionally inflicted. Further, the trial court itself acknowledged it was uncertain whether the injury was intentional. We are troubled by the possibility that the trial court predicated its termination decision on Ashbrook's refusal to "admit" something she could not have known. To the extent that Collins posed a risk to the children, the evidence showed that Ashbrook and Collins, who were never married, had separated and that Collins was no longer living in the home. Although concerns were expressed that Collins and Ashbrook would resume living together, the record shows that Collins was subject to a restraining order that prohibited him from coming near the children.

Despite evidence that Ashbrook had certain limitations, it was agreed that she had the mental capacity necessary to parent a child, and it was not seriously disputed that she loved her children, visited them regularly, and wanted them back. Moreover, Ashbrook was working, had appropriate housing, had completed parenting classes, and had participated in every service offered to her. After reviewing the record, we therefore conclude that the evidence did not clearly and convincingly show that there was a reasonable likelihood that the children would be harmed if returned to Ashbrook's home. The trial court thus clearly erred in finding that termination of Ashbrook's parental rights was warranted under § 19b(3)(j).

⁴ We note, again, that the trial court also terminated Collins' parental rights to the children, but he is not a party to this appeal.

We recognize the trial court's frustration and we are cognizant of the need for finality in cases of this type; however, termination of parental rights cannot be founded solely on a "best interests" analysis, unsupported by the requisite proof of parental unfitness.⁵

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray

⁵ *In re JK*, 468 Mich 202, 211; 661 NW2d 216 (2003), citing *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978).